IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 225 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SHREE DIGVIJAY CEMENT CO LTD - Applicant(s)
Versus
COMMISSIONER OF INCOME TAX - Respondent(s)

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Appearance :
MR RK PATEL for Applicant(s) : 1,
MRS. MONA BHATT for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG
and
HONOURABLE MR.JUSTICE M.R. SHAH

Date : /08/2006

C.A.V.

(Per : HONOURABLE MR.JUSTICE M.R. SHAH)

The Income Tax Appellate Tribunal, Ahmedabad Bench 'A' has referred the following question for our opinion under Section 256(1) of the Income Tax Act, 1961 [hereinafter referred to as 'the Act' for short];

> "Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that an amount of Rs. 7,38,11,883/- in account of interest on the outstanding sales-tax amount is part of sales-tax and can be disallowed in the course of making "Prima facie" adjustments under section 143(1)(a) of the Act in view of section 43B of the Income-tax Act, 1961 ?"

2. The assessee submitted return of income-tax for the assessment year 1992-93 declaring a 'Nil' income. The said return of income of the assessee was processed by the Assessing Officer under Section 143(1)(a) of the Income Tax Act and intimation was sent to the assessee on 11.5.1993 computing total income at Rs. 4,83,10,445/- by making following adjustments in the total income returned by the assessee;

(a)	Disallowance of earlier years expenses.	Rs. 31,31,180/-
(b)	Disallowance of expenditure on presentation articles u/s. 68.	Rs. 6,10,803/-
(c)	Disallowance u/s. 43B of interest on arrears of sales tax.	Rs.7,38,11,883/-

It appears that, initially, by mistake the intimation issued by the Assessing Officer on 11.5.1993 was of loss instead of income of Rs. 4,83,10,445. The assessee moved an application on 24.6.1993 under Section 154 of the Act for rectification of the mistake said to be apparent in the order under Section 143(1)(a) on the ground that the aforesaid 3 adjustments to the returned income were beyond the scope of Section 143(1)(a) as the same do not come under the category of prima facie “adjustments”. The assessee also contended on merits. The contention of the assessee, relating to the amount of Rs. 31,31,180/- on account of earlier years' expenses being disallowed was accepted and the said amount was deleted vide order 21.7.1993 on the application of the assessee moved under Section 154 of the Act. So far as

the other contention of the assessee that the interest on outstanding sales-tax calculated at Rs. 7,38,11,883/- has wrongly been added because the same does not form part of the sales-tax to be disallowed under Section 43B of the Act and is not to be adjusted as per provisions of Section 143(1)(a) is concerned, the same was rejected. The contention on behalf of the assessee, with regard to adjustment of Rs. 6,10,803/-, also came to be confirmed by the aforesaid order dated 21.7.1993. Being aggrieved and dissatisfied with the order passed by the Assessing Officer recorded under Section 154 of the Act, the assessee preferred an appeal before the Commissioner, Income Tax (Appeals) against remaining two adjustments of Rs. 6,10,803/- relating to expenses on presentation of articles under Rule 6-B of the Income Tax Rules and Rs. 7,38,11,883/- adjusted under Section 43-B of the Act relating to interest on arrears of sales-tax. The Commissioner, Income Tax (Appeals) accepted the contention on behalf of the assessee with regard to adjustment of Rs. 6,10,803/- incurred by the assessee for purchase of presentation articles and held that the Assessing Officer was not justified in disallowing the expenditure incurred on presentation articles and accordingly the Assessing Officer was directed to

delete the said addition. However, the Commissioner, Income Tax (Appeals) rejected the contention of the assessee relating to adjustment of Rs. 7,38,11,883 added to the income of the assessee on account of interest on arrears of sales-tax due and not paid in the year under consideration, by invoking the provisions of Section 43B of the Act. Being aggrieved and dissatisfied with the order passed by the Commissioner of Income Tax (Appeals) confirming the order passed by the Assessing Officer in adding Rs. 7,38,11,883/- on account of interest on arrears of sales-tax due and not paid in the year under consideration, the assessee preferred further appeal before the Income Tax Appellate Tribunal, Ahmedabad Bench 'A'. It was contended on behalf of the assessee that the amount of interest on outstanding sales-tax amount calculated at the rate of 24% p.a. will not be covered under the provisions of Section 43B of the Act, as the amount of interest is not included in the word “tax” used in Section 43B of the Act. It was further contended by the assessee that in the preceding year, i.e., assessment year 1991-92 relating to the assessee itself, the Assessing Officer had made similar prima facie adjustments but deleted the same when application under Section 154 was moved by the assessee, and

that fact made the issue debatable and took it out of the ambit of Section 143(1)(a) of the Act. It was the contention on behalf of the Revenue that, in view of the decision of the Hon'ble Supreme Court in the case of Mahalaxmi Sugar Mills Company Vs. CIT, Delhi, (1980) 123 ITR 429, the said issue has not remained debatable and therefore the case falls within Section 143(1)(a) of the Act and that the amount of Rs. 7,38,11,883/- has rightly been added to the income of the assessee on account of interest on arrears of sales-tax. Considering the rival submissions, the Tribunal dismissed the appeal preferred by the assessee by holding that the interest on outstanding amount of sales-tax became part of the sales-tax, and in view of the decision of the Hon'ble Supreme Court in the case of Mahalaxmi Sugar Mills Company (supra), the said issue was not a debatable issue. The Tribunal further opined that the action of the Income Tax Officer in the immediate preceding year, deleting the amount of interest on arrears of sales-tax, was a mistake and should not be treated as a precedent, and it was not wise on his part to repeat the same mistake nor his action will make the issue debatable as the said issue has been finally decided by the Hon'ble Supreme Court in the case of *Mahalaxmi Sugar Mills Company (supra)*. However,

at the instance of the assessee, the learned Tribunal referred the aforesaid question to this Court for opinion.

3. Shri R.K. Patel, learned counsel appearing on behalf of the assessee, has vehemently submitted that the learned Tribunal has committed an error in holding that the case was falling within Section 143(1)(a) of the Act. It is submitted by him that the adjustment of Rs. 7,38,11,883/- to the returned income was beyond the scope of Section 143(1)(a) as the same do not come under the category of prima facie “adjustments”. It is submitted by him that the issue, whether interest on outstanding tax can be said to be treated as part of the sales-tax to be disallowed under Section 43B of the Act or not or disallowance u/s. 43B of the Act on the ground of its non-payment or not was a debatable question, more particularly in view of the fact that in the preceding year the same was initially adjusted by the Assessing Officer treating it to be the income, however the same was deleted when the application under Section 154 was moved by the assessee, and in that view of the matter Section 143(1)(a) of the Act would not be applicable. Shri Patel has further submitted that the Assessing Officer in the assessment year

1991-92 disallowed the amount of interest on arrears of sales-tax, however on an application under Section 154 of the Act the Assessing Officer deleted the same by allowing the said application by order dated 11.5.1992 by observing that the matter is highly debatable and it ceased to be prima facie inadmissible. It is therefore submitted by him on the basis of the aforesaid order that the Department itself has made this issue debatable and when in the case of the assessee itself the Assessing Officer took a contrary view to the view adopted in the year under consideration, and when two views are possible on a particular issue, then it is a debatable issue and comes out of the scope of the word "prima facie". Shri Patel has relied upon Instruction No. 1814 [CBDT Circular No. F/244/89/ITA-II] dated 4.4.1989 clarifying the position under Section 143-A as was amended on 1.4.1989. According to Shri Patel, the scope under Section 143(1)(a) was restricted to the same type of adjustments which may be obvious or apparent admissible/inadmissible as is the scope of Section 154 of the Act defined by the Hon'ble Supreme Court in *T.S. Balaram, Income-Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers and Others, 82 ITR Page 50.* It is therefore submitted by him that

when there were two views possible, the assessee's case was not of prima facie inadmissibility or deduction to be made under Section 143(1)(a) of the Act. Therefore, it is submitted by him that the case does not fall under Section 143(1)(a) of the Act. Shri Patel has submitted that so far as inclusion of Rs. 7,38,11,883/- in the income of the assessee and not granting the deduction under Section 43B of the Act is concerned, subsequently in the assessment order under Section 143(3) of the Income Tax Act, the Assessing Officer for the very Assessment Year 1992-93 has held the said amount of Rs. 7,38,11,883/- was not liable for deduction under Section 43-B of the Act and the same is disallowed under Section 43B of the Act by further holding that the interest on sales-tax is also 'tax' and therefore not allowable under Section 43B of the Act unless actually paid and therefore so far as that issue is concerned, i.e., whether the amount of Rs. 7,38,11,883/- was required to be deducted by granting deduction under Section 43B of the Act, the same will not survive. However, the question is whether the Assessing Officer was justified in invoking the provisions of Section 143(1)(a) of the Act for the purpose of above adjustments in total income, i.e., making adjustment of Rs. 7,38,11,883/-,

while making disallowance under Section 43B of interest on arrears of sales-tax or not, as if Section 143(1)(a) of the Act is applied, then the assessee was required to pay an additional income-tax calculated at the rate of 20% of the tax payable on such excess amount of tax payable. Shri Patel has further submitted that additional liability of 20% of the tax on invocation of Section 143(1)(a) of the Act as envisaged under Section 143(1)(A)(a) is by way of penalty for not submitting proper return and when the issue is debatable, such imposition of additional tax of 20% is not warranted and therefore in the facts and circumstances of the case the learned Tribunal has committed an error in holding that Section 143(1)(a) would be attracted. He has relied upon the judgment of the Hon'ble Supreme Court in the case of *T.S. Balaram, Income-Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers and Others,* (supra) and has submitted that as observed by the Hon'ble Supreme Court, a mistake apparent on the record must be an obvious and patent mistake and not something which can be established by long drawn process of reasoning on points on which there may be conceivably two opinions. A decision of a debatable point of law is not a mistake apparent from the record. Therefore, it is

submitted that the Tribunal has committed an error in holding that Assessing Officer was justified in initiating the proceedings under Section 143(1)(a) of the Act and/or Section 143(1)(a) would be attracted.

4. Mrs. Mona Bhatt, learned counsel appearing on behalf of the Revenue, while supporting the order passed by the Tribunal, has submitted that in view of the judgment of the Hon'ble Supreme Court in the case of *Mahalaxmi Sugar Mills Company (supra)* the issue was already determined and the interest on unpaid tax was required to be considered as part of tax; that it was not required to be deducted under Section 43B of the Act unless actually paid; and therefore that the said issue did not remain debatable; and therefore the Tribunal was justified in holding that Section 143(1)(a) was attracted. It is submitted by her that merely because the Assessing Officer in the earlier years has granted benefit wrongly and even contrary to the decision of the Hon'ble Supreme Court, that itself will not make the issue debatable more particularly when in view of the judgment of the Hon'ble Supreme Court in the case of *Mahalaxmi Sugar Mills Company (supra)* the issue was already decided and

therefore the Assessing Officer was justified in making adjustment under Section 143(1)(a) and therefore it is requested to confirm the order passed by the Tribunal.

5. At the outset, it is required to be noted that, the assessee claimed deduction of Rs. 7,38,11,883/- under Section 43B of the Act on account of interest at the rate of 24% p.a. under Section 47(4A) of Gujarat Sales Tax on the outstanding sales-tax amount. An identical question came to be considered by the Hon'ble Supreme Court in the case of *Mahalaxmi Sugar Mills Company (supra),* where, considering the provisions of U.P. Sugarcane Sales Act, 1956, the Hon'ble Supreme Court held that interest provided under Section 3(3) of the said Act was in the nature of compensation paid to the Government for delay in payment of sales-tax and it was not by way of penalty and the interest payable on arrears of cess u/s. 3(3) is part and parcel of the liability to pay cess. Now, applying the said analogy, the amount of interest due on outstanding amount of sales-tax becomes part of the sales-tax and will be covered in the word “tax”, and thus interest payable on arrears of sales-tax is in reality part and parcel of liability of the sales-tax, and therefore

the same cannot be allowed as deduction unless it is actually paid as the same is hit by the provisions of Section 43B of the said Act. It is also required to be noted at this stage that, even the aforesaid amount of Rs. 7,38,11,883/- is disallowed by the Assessing Officer while passing the assessment orders under Section 143(3) of the Act, and it appears that the same has been accepted by the assessee also. Therefore, as such there is no dispute on merits whether the amount of Rs. 7,38,11,883/- warranted deduction under Section 43B of the Act or not. However, the only question which is required to be considered is whether the Assessing Officer was justified in invoking the provisions of Section 143(1)(a) of the Act.

6. It is the contention on behalf of the assessee that the issue was a debatable one more particularly in view of the fact that in the immediate preceding year the Assessing Officer himself accepted the rectification application on the similar ground and deleted the adjustments, and the issue, that the amount of interest of Rs. 7,38,11,883/- on the arrears of sales-tax, and was disallowable under Section 43B of the Act on the ground of its non-payment or not, was a debatable issue, and

once it is a debatable question, that goes out of the ambit of Section 143(1)(a) of the Act. Therefore, the question which is now required to be considered by this Court is whether in the assessment year 1992-93, when the Assessing Officer invoked provisions of Section 143(1)(a) of the Act and passed the order adjusting prima facie and adding Rs. 7,38,11,883/- being interest on outstanding sales-tax calculated at 24% p.a., but not paid, and disallowed the same under Section 43B of the Act, the said question was a debatable question or not, and whether the Assessing Officer was justified in adjusting, prima facie, and adding the aforesaid amount or not.

7. Section 143(1)(a) of the Act reads as under;

> "**Assessment**.
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> **143**. (1) (a) Where a return has been made under section 139, or in response to a notice under sub-section (1) of section 142,__
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> (i) if any tax or interest is found due on the basis of such return, after adjustment of any tax deducted at source, any advance tax paid and any

amount paid otherwise by way of tax or interest, then, without prejudice to the provision of sub-section (2), an intimation shall be sent to the assessee specifying the sum so payable, and such intimation shall be deemed to be a notice of demand issued under section 156 and all the provisions of this Act shall apply accordingly; and

(ii) if any refund is due on the basis of such return, it shall be granted to the assessee;

Provided that in computing the tax or interest payable by, or refundable to, the assessee, the following adjustments shall be made in the income or loss declared in the return, namely:___

(i) any arithmetical errors in the return, accounts or documents accompanying it shall be rectified;

(ii) any loss carried forward, deduction, allowance or relief, which, on the basis of the information available in such

return, accounts or documents, *is prima facie admissible* but which is not claimed in the return, shall be allowed.

(iii) any loss carried forward, deduction, allowance or relief claimed in the return, which, on the basis of the information available in such return, accounts, or documents, *is prima facie inadmissible,* shall be disallowed:

Section 143(1)(a) of the Act provides that, where a return has been made under Section 139, or in response to a notice under sub-section (1) of section 142, if any tax or interest is found due on the basis of such return, after adjustment of any tax deducted at source, any advance tax paid and any amount paid otherwise by way of tax or interest, then, without prejudice to the provisions of sub-section (2), an intimation shall be sent to the assessee specifying the sum so payable, and such intimation shall be deemed to be a notice of demand issued under section 156. As per the proviso to Section 143(1)(a), in computing the tax or interest payable by, or refundable to the assessee, any arithmatical errors in the return, accounts or documents accompanying it shall be rectified or any loss carried forward,

deduction or relief, which, on the basis of the information available to such return, accounts or documents *is prima facie admissible* but which is not claimed in the return, shall be allowed by making adjustments. As per the said Proviso, any loss carried forward, deduction, allowance, or relief claimed in the return, which, on the basis of the information available in such return, accounts or documents, *is prima facie inadmissible*, shall also be disallowed while making the adjustments. It is the contention on behalf of the assessee that, in view of earlier order passed by the Assessing Officer in the preceding assessment year, i.e. 1991-92, the deduction was granted, and deleted the said disallowance relating to amount of interest on arrears of sales-tax the said issue was highly debatable and it ceased to be prima facie inadmissible and therefore Section 143(1)(a) would not be applicable.

8. Now, as stated hereinabove, at the time when the assessee submitted the Return of income for Assessment Year 1992-93 declaring 'Nil' income and not including the amount of Rs. 7,38,11,883/- in the total income, the decision of Hon'ble Supreme Court in the case of *Mahalaxmi Sugar Mills Company*

(supra) was in force as the said judgment was delivered in 1980. Not only that, but when the Assessing Officer accepted the rectification application submitted by the assessee for the assessment year 1991-92 deleting the amount of Rs. 4,83,10,445 being the amount of interest on arrears of sales-tax, the Assessing Officer committed a mistake in allowing the said application under Section 154 and deleting the aforesaid amount, as on that day also the decision of the Hon'ble Supreme Court in the case of *Mahalaxmi Sugar Mills Company (supra)* was in force. Still, for whatever be the reason, the Assessing Officer granted the benefit of Section 43B and granted the deduction and not included the amount of interest on unpaid sales-tax treating it not to be part of the tax. In any case, so far as assessment year 1992-93 is concerned, in view of the decision of the Hon'ble Supreme Court in the case of *Mahalaxmi Sugar Mills Company (supra),* the law on the point was very clear and it was specifically held by the Hon'ble Supreme Court that amount of interest on arrears of cess is a part of the cess and therefore Section 43-B of the Act would be applicable and the said amount is not to be deducted unless it is actually paid. Therefore, the question, whether the amount of interest on unpaid sales-tax being part of

the tax was to be considered and that the provisions of Section 43B of the said Act would be applicable, did not remain a debatable question/issue, in view of the law laid down by the Hon'ble Supreme Court Not only that the same was not a debatable question, but in view of the law laid down by the Hon'ble Supreme Court, no two views were possible. Under the circumstances, the Assessing Officer was justified in invoking the provisions of Section 143(1)(a) for including the aforesaid amount of Rs. 7,38,11,883 towards interest on unpaid sales-tax in the income and dissallowing the same by holding that it was prima facie inadmissible. Merely because in the preceding year the Assessing Officer had, by mistake and/or for any other reason, wrongly allowed the deduction, the question, which was already settled by the Supreme Court, will not become a debatable one. As rightly observed by the C.I.T. (A) and the Tribunal, the Assessing Officer was not required to repeat the mistake, or wrong, and/or perpetuate the illegality committed. On the contrary, the Assessing Officer is justified in disallowing the deduction of the aforesaid amount and treating it as inadmissible and has rightly disallowed the same by following the decision of the Hon'ble Supreme Court in the case of *Mahalaxmi Sugar Mills*

Company (supra). It is not in dispute that the law declared by the Hon'ble Supreme Court is binding to all under Article 141 of the Constitution of India. The assessee was supposed to know the law, and it is not even the case of the assessee that the assessee was not aware of the correct law. However, the assessee is simply relying upon the order passed by the Assessing Officer for the immediate preceding year and accordingly he has tried to submit that the issue was a debatable issue. However, as stated above, even if the Assessing Officer granted the benefit in the preceding year, in breach of the clear decision of the Hon'ble Supreme Court, it cannot be said that the issue remained debatable. Under the circumstances, the contention on behalf of the assessee, that the Assessing Officer has committed an error in adjusting the aforesaid amount of interest on unpaid sales-tax and disallowing deduction by invoking the provision under Section 143(1)(a) of the Act, cannot be accepted. Once the provisions of Section 143(1)(a) of the Act are invoked and certain amount is held to be prima facie inadmissible, and is disallowed, and is included as income on adjustment, necessary consequences of payment of an additional income-tax calculated at the rate of 20% of the tax payable on

such excess amount must follow as required under Section 143(1)(A)(a)(i) of the Act and the Assessing Officer shall further increase the amount of tax payable under sub-section (1) after additional income-tax is calculated at the rate of 20% of the tax payable on such excess amount and he is required to specify the additional income-tax in the intimation to be sent under sub-clause (i) of clause (a) of sub-section (1) of Section 143 of the Act. Under the circumstances, neither the Assessing Officer, nor the Commissioner, Income Tax (Appeals), nor the Income Tax Appellate Tribunal, has committed any error in holding that the provisions of Section 143(1)(a) would be attracted; that there was no debatable question; and that the Assessing Officer was also justified in holding that it was prima facie inadmissible.

9. For the foregoing reasons, the question is answered against the interests of the assessee and in favour of the Revenue. The Reference shall stand disposed of accordingly. No costs.

[R.S. Garg, J.]

rmr. [M.R. Shah, J.]